IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 212 of 1993

For Approval and Signature:

THE HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

COMMISSIONER OF INCOME-TAX - Petitioner(s)

Versus

NEEKA TUBES PVT LTD - Respondent(s)

==========

Appearance :

MR MANISH R BHATT for Petitioner

NOTICE SERVED for Respondent No(s).: 1.

==========

CORAM :THE HON'BLE MR.JUSTICE D.A.MEHTA

HON'BLE MS.JUSTICE H.N.DEVANI

Date : 13/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE D.A.MEHTA)

1. Income Tax Appellate Tribunal, Ahmedabad Bench "B" has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

"(1) Whether the Appellate Tribunal is right in law and on facts in directing the ITO to take into account the amount of Rs.2,00,036/- representing the value of plant and machinery under erection for computing the capital employed for the purpose of relief under Section 80J of the Income Tax Act ?

(2) Whether the Appellate Tribunal is right in law and on facts in directing the ITO to take into account the amount of Rs.46,90,341/- being the amount of loan from the old unit for computing the capital employed for the purposes of relief under Section 80J of the Act?"

1. The assessment year is 1983-84 and the relevant accounting period is the year ended on 30th June 1982. The assessee, a Limited Company, was carrying on business of manufacturing stainless steel tubes and manufacturing of machinery and components for tube making plants.
2. A deduction of Rs.4,38,228/- was claimed under Section 80J of the Act. The assessing officer held that plant and machinery valued at Rs.2,00,036/- which was under erection had wrongly been considered as assets. He excluded the said amount from the capital employed.
3. The assessing officer also held that, while computing the capital employed, the assessee company had not deducted the sum of Rs.46,90,341/- while deducting the liabilities. According to him, the said sum was received from the old unit i.e. Machinery Division by the new unit, namely the Tube Division and as the balance sheet of the Machinery Division showed the same as loan to the new unit, the same was required to be excluded while computing the capital employed.
4. The assessee carried the matter in appeal before the CIT (Appeals), who for the reasons stated in his order dated 2nd January 1987, held that, (1) the assessee was entitled to treat the amount of plant and machinery under erection as capital employed, and (2) the sum of Rs.46,90,341/- was not required to be reduced from the figure of capital employed.

The revenue carried the matter in appeal before the Tribunal. The Tribunal dismissed the departmental appeal vide its order dated 1st June 1990, against which the revenue has approached this Court.

5. Mrs.M.M.Bhatt appearing on behalf of Mr.M.R.Bhatt, the learned Senior Standing Counsel for applicant revenue submitted that question No.1 was concluded against the revenue by decision of the Supreme Court in case of Commissioner of Income Tax v. Alcock Ashdown and Co. Ltd., (1997) 224 ITR 353, wherein the Apex Court had approved decision of this Court in case of C.I.T. v. Cibatul Ltd., (1978) 115 ITR 879, which was followed by the Tribunal.

6. In light of the aforesaid statement, it is not necessary to set out the facts and contentions in relation to question No.1 and the same is accordingly answered in the affirmative i.e. in favour of the assessee and against the revenue, following the aforesaid decision in case of Commissioner of Income Tax v. Alcock Ashdown and Co. Ltd. (supra).

7. In so far as question No.2 is concerned, it was submitted on behalf of revenue that once the balance sheet of the old unit, namely, Machinery Division reflected the sum of Rs.46,90,341/- as loan, nothing further was required to be done and the assessing officer was right in excluding the said sum, as it would be a liability which was not deductible. She emphasized the fact that both the units had maintained separate accounts and drawn up separate balance sheets and therefore, had to be treated as independent persons.

8.1 Mrs.Bhatt, in the course of her submissions, referred to decisions in case of Commissioner of Income Tax v. Gujarat State Fertilizer Co. Ltd., [1996] 219 ITR 550 and on case of Lohia Machines Ltd. v. Union of India, [1985] 152 ITR 308, to submit that in case of a borrowing for an outstanding liability, the same was not includible in capital for the purpose of Section 80J of the Act. The said contention is, to say the least, based on a misconception as to the facts of the case and the aforesaid decisions have no relevance to the controversy at hand.

9. The Tribunal, while deciding the issue, has held that:

“If the surplus, reserve and the existing capital of the company is available with it and the same is employed for purchase of plant and machinery, building and other assets of the new industrial undertaking, the capital so utilized for acquiring the assets in the new industrial undertaking will amount to employment of capital in the new industrial undertaking.”

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

parmar*